(1)

Supreme Court, U.S.
FILED

06-310 SEP 1 - 2006

OFFICE OF THE CLERK

In the Supreme Court of the United States

MOHAMMAD ABU HASHISH,

Petitioner,

v.

ALBERTO GONZALES,
ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEFFREY A. KRIEZELMAN*
JUSTIN R. BURTON
SAADIA SIDDIQUE
KRIEZELMAN & ASSOCIATES, LTD.
20 NORTH CLARK STREET
SUITE 725
CHICAGO, IL 60602
(312) 332-2550

Counsel for Petitioner Mohammad Abu Hashish

**Counsel of Record*

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

QUESTION PRESENTED

Since Congress failed to provide a statutory definition for what is a crime involving moral turpitude, the Board of Immigration Appeals and circuit courts have patched together various differing interpretations in attempting to define its terms. The question presented is twofold: (1) what is a crime involving moral turpitude and; (2) whether a non-traditional theft offense, in this case theft of a recordable sound, falls into the definition of a crime involving moral turpitude.

LIST OF PARTIES

All parties in the proceedings below are listed in the caption to this Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual and is not a corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. Historical Background 4

B. Factual Background 6

C. Proceedings Below 8

REASONS FOR GRANTING THE PETITION 9

A. The Federal Courts Continue To Grapple With What Crimes Involve Moral Turpitude 9

B. Review Is Also Warranted Because The Decision Of The Seventh Circuit Fails To Undertake Any Analysis Of The Underlying Convictions In Concluding The Offenses To Be Crimes Involving Moral Turpitude 14

C. The Issue Is One Of Substantial Practical Importance 16

1. Uniformity 16

2. Vagueness 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Abdelqadar v. Gonzales, 413 F.3d 668
(7th Cir. 2005) 8, 9

Alleyne v. INS, 879 F.2d 1177
(3rd Cir. 1989) 11

Carbal v. INS, 15 F.3d 193
(1st Cir. 1994) 12

Chevron USA Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984) 6, 10, 16

Chiaramonte v. INS, 626 F.2d 1093
(2nd Cir. 1980) 9

Cuevas-Gaspar v. Gonzales, 430 F.3d 1013
(9th Cir. 2005) 5

Dashto v. INS, 59 F.3d 697
(7th Cir. 1995) 15

In re Ajami, 22 I&N Dec. 949
(BIA 1999) 4, 11

In re Danesh, 19 I&N Dec. 669
(BIA 1988) 4, 10

In re De La Nues, 18 I&N Dec. 140
(BIA 1981) 10

In re M, 2 I&N Dec. 721
(Att'y Gen. 1946) 10, 11

In re N, 8 I&N Dec. 466
(BIA 1959) 10, 11

In Re Sanudo, 23 I&N Dec. 968
(BIA 2006) 6

In re V-Z-S-, 22 I&N Dec. 1338
(BIA 2000) 5

Jordan v. De George, 341 U.S. 223 (1951) 3, 17, 18

Maghsoudi v. INS, 181 F.3d 8
(1st Cir. 1999) 12

Marcianao v. INS, 450 F.2d 1022
(8th Cir. 1971) 6

Matter of Grazley, 14 I&N Dec. 330
(BIA 1973) 5

Matter of Scarpulla, 15 I&N Dec. 139
(BIA 1974) 5, 10

Mei v. Ashcroft, 393 F.3d 737
(7th Cir. 2004) .....passim

Michel v. INS, 206 F.3d 253
(2nd Cir. 2000) 12, 13, 18

Nugent v. Ashcroft, 367 F.3d 162
(3rd Cir. 2004) 5

Okabe v. INS, 671 F.2d 863
(5th Cir. 1982) 11, 12

Okoro v. INS, 125 F.3d 920
(5th Cir. 1997) 8, 9

Padilla v. Gonzales, 397 F.3d 1016
(7th Cir. 2005) 5

Rodriguez-Castro, 427 F.3d 316
(5th Cir. 2005) 12

Soetarto v. INS, 516 F.2d 778
(7th Cir. 1995) 15

Solano-Chicas v. Gonzales, 440 F.3d 1050
(8th Cir. 2006) 11

Solorzano-Potlan v. INS, 207 F.3d 869
(7th Cir. 2000) 14, 15

United States v. Lewis, 405 F.3d 511
(7th Cir. 2005) 15

STATUTES, RULES AND REGULATIONS

Immigration and Nationality Act, 26 Stat. 1084 (1891) 4

Immigration and Nationality Act ("INA"), Pub. L. No. 82-414, 66 Stat. 163 (1952)

INA § 212(a)(2) 2

INA § 212(a)(2)(A)(i) 2, 19

INA § 212(a)(2)(A)(ii)(II) 7

INA § 237(a)(2) 2, 3

INA § 237(a)(2)(A)(i) 2

INA § 237(a)(3) 2

INA § 237(a) 2

INA § 240A(b) 1, 3, 7

INA § 245(j) 2

28 U.S.C. § 1245(1) 1

28 U.S.C. § 2350(a) 1

8 U.S.C. § 1182(a)(2)(A)(i) 2

8 U.S.C. § 1227(a)(2) 3

8 U.S.C. § 1227(a)(2)(A)(i) 2

8 U.S.C. § 1229b(b) 1

8 U.S.C. § 1252 8

Illinois Revised Statutes, 38-16-1 .....6, 7

720 ILCS 5/16-1(A)(1) 7

MISCELLANEOUS

Brian C. Harms, *Redefining Crimes of Moral Turpitude: A Proposal to Congress,* 15 *Geo. Immigr. L.J.* 259 (2001) 4

Charles Gordon, Et. Al., *Immigration Law and Procedure,* § 71.05[1][d][i] (rev. ed. 1999) 5

Wall Street Journal, July 3, 2002 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mohammad Abu Hashish, respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1-16) is reported at 442 F.3d 572. The petition for rehearing of June 6, 2006 (App., *infra* 17*)*, the final order of the Board of Immigration Appeals ("Board") (App., *infra* 18-20*)*, and the Immigration Judge's decision (App., *infra* 21-27*)*, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2006. The jurisdiction of the Court is invoked under 28 U.S.C. §§ 1245(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b), INA § 240A(b)[1] of the Immigration and Nationality Act ("INA") provides that certain non permanent Residents residing in the United States may request the Attorney General cancel their removal and adjust their status to lawful permanent resident provided the following provisions have been met:

[1] All citations to the INA will initially include their corresponding United States Code sections. Thereafter, they will be referred to only by their INA sections.

> (A) has been physically present in the Untied States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;
> (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) (except in a case described in section 237(a)(7) where the Attorney General exercised discretion to grant a waiver); and
> (D) established that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1227(a)(2)(A)(i), INA § 237(a)(2)(A)(i)[2] is labeled crimes of moral turpitude and provides that an alien is removable from the United States if her or she:

> (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and
> (II) is convicted of a crime for which a sentence of one year or longer may be imposed.

STATEMENT

This case presents two questions: (1) what is the definition of a crime involving moral turpitude, and (2) what crimes fall under that definition so as to preclude an

---

[2] The analogous provision for inadmissibility is found at 8 U.S.C. § 1182(a)(2)(A)(i), INA § 212(a)(2)(A)(i).

otherwise eligible individual from filing for relief from removal—in this case an application for cancellation of removal under INA § 240A(b).[3] A review of circuit case law illustrates that the definition used to determine a crime involving moral turpitude and what crimes encompass it varies. Further, the approach courts have utilized in deciding which crimes fall under its definition is determined on a case by case basis and the language of the statute makes it virtually impossible to determine what conduct is permissible to guide an alien as to what offenses will have the grave consequence of removing him from the United States.

This Court last addressed the issue of "crimes involving moral turpitude" in the immigration context for the crime of conspiracy to defraud the United States of taxes on distilled spirits. *Jordan v. De George*, 341 U.S. 223 (1951). Although the Court concluded that the term was not unconstitutionally vague, it stated that the test for determining the same is "whether the language conveys sufficiently definite warning as to the proscribed co..duct when measured by common understanding and practices." *Id.* at 231, 232. In a dissent by Justices Jackson, Black and Frankfurter, they concluded that the "phrase 'crime involving moral turpitude', as found in the Immigration Act, has no sufficiently definite meaning to be a constitutional standard for deportation." *Id.* at 232.

The circuit courts have also had difficulty in defining what "moral turpitude" is and the general definition they have accepted does not explain how certain crimes fall into that definition, specifically crimes involving theft. Because

---

[3] Crimes involving moral turpitude can also serve as a ground for inadmissibility and deportability from the United States and not just a preclusion for forms of relief. *See* 8 U.S.C. § 1227(a)(2), INA § 237(a)(2).

the circuits are applying a particular definition to a theft crime without providing rationale as to why a particular theft crime involves moral turpitude under the accepted definition, an alien is left without any reasonable explanation as to why his or her crime is one that involves moral turpitude. Absent this Court's intervention, the issue will not be resolved.

A. Historical Background

The use of the phrase "moral turpitude" has deep roots in all areas of law. It first appeared in the immigration context on March 3, 1891, when the Immigration Act required an alien be excluded for having been "convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Act of March 3, 1891, 26 Stat. 1084. *See generally,* Brian C. Harms, "Redefining Crimes of Moral Turpitude: A Proposal to Congress," 15 *Geo. Immigr. L.J.* 259, 262 (2001). The immigration law definition essentially has evolved from a criminal law definition, although current case law on the topic has been dominated by the immigration arena. The Board of Immigration Appeals defines the term to be "an act which is per se morally reprehensible and intrinsically wrong, or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *In re Ajami,* 22 I&N Dec. 949, 950 (BIA 1999). The Board further defines moral turpitude to be conduct "which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between [persons or to] society in general." *In re Danesh,* 19 I&N Dec. 669 (BIA 1988).

Having no statutory definition in place by Congress, the courts have been left to grapple with defining the term and have thus utilized different approaches in classifying

which crimes fall under its definition.[4] Some circuits provided their own definition having found the Board of Immigration Appeal's definition unworkable, while others have adopted its definition. Crimes generally involving theft have been classified to involve moral turpitude when there is intent to deprive, *Matter of Scarpulla,* 15 I&N Dec. 139 (BIA 1974), and when there is inte .t at permanent taking. *See In re V-Z-S,* 22 I&N Dec. 1338, n. 12 (BIA 2000). When money or cash is involved, the Board has stated that it is crime of moral turpitude. *Matter of Grazley,* 14 I&N Dec. 330 (BIA 1973). Courts of Appeals have also classified theft crimes to involve moral turpitude. *See Nugent v. Ashcroft,* 367 F.3d 162, 165 (3rd Cir. 2004); *Mei v. Ashcroft,* 393 F.3d 737 (7th Cir. 2004).

The courts have utilized differing approaches to determine what crimes involve moral turpitude, some employing a categorical approach and others looking at the actual individual's conduct. When a "categorical" approach is utilized only the elements of the statute are examined. *Padilla v. Gonzales,* 397 F.3d 1016 (7th Cir. 2005) and *see generally* GORDON, ET AL., supra note 44, at § 71.05[1][d][ii]. In cases where a divisible statute is present, the court reviews the record of the conviction to determine if the alien's conviction involves the portion of the statute that is deemed to involve moral turpitude. The Ninth Circuit also developed what it terms a "modified categorical approach" when the "statute of conviction is broader than the generic definition of the crime." *Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013, 1020 (9th Cir. 2005). A separate minority

---

[4] Although Congress has not provided a definition for the phrase "moral turpitude", its flexibility suggests that it is a phrase which Congress intended to design to accommodate changes in moral standards, as opposed to legal standards. *See* CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05[1][d] [[i] (rev. ed. 1999).

approach involves analyzing the circumstances of an individual's case, in addition to the record of conviction, to support whether a crime involves moral turpitude. *Marciano v. INS*, 450 F.2d 1022 (8th Cir. 1971). Regardless of which approach is utilized, the courts will generally give *Chevron* deference to the Board's definition of a crime involving moral turpitude. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Despite the approaches and the Board's general definition and classification of crimes as involving moral turpitude, "the Board has [not] done anything to particularize the meaning of "crime involving moral turpitude," and courts are continuing to decide the issue *ad hoc* as each and every case remains litigated. Thus, they continue to have difficulty deciding which crimes involve moral turpitude.[5] *Mei*, 393 F.3d at 739.

B. Factual Background

Petitioner, Mohammad Abu Hashish, is a native and citizen of Jordan who last arrived to the United States on February 5, 1990 as a nonimmigrant visitor. He has numerous family members in the United States including five United States citizen children. Mr. Abu Hashish worked various jobs in the United States upon his admission and at one point was the owner and distributor of a candy company. He also owned and operated two different grocery stores from 1994 until 2000.

On November 2, 1992, he pled guilty to the offense of theft of a recordable sound in violation of the former

---

[5] In fact, during the preparation of this Writ, the Board of Immigration Appeals came down with yet another case discussing crimes involving moral turpitude where the Board determined that domestic battery in violation of California Penal Code 42 that requires an "unprivileged touching" of the victim by means of force or violence is not a crime involving moral turpitude. *In Re Sanudo*, 23 I&N Dec. 968 (BIA 2006).

Illinois Criminal Code, 38-16-1M, a misdemeanor. He was sentenced to one year probation and required to pay restitution. In 1999, he was again arrested for unauthorized control over the property of an owner when he was approached at his grocery store by an individual selling him merchandise. On December 16, 2002, he pled guilty to this offense, under Illinois statute 720 ILCS 5/16-1(A)(1), and given "conditional discharge sentence" of two years and required to pay restitution. See A.R. 269, 271-72.[6] The charge was amended to a misdemeanor.

Mr. Abu Hashish was placed in removal proceedings in 2000 and charged as being removable from the United States for remaining longer than permitted. See App., *infra,* 22. Before the Immigration Judge, he made a request for an application for cancellation of removal under INA § 240A(b). The Immigration Judge pretermittted his application for cancellation of removal on the basis that his two convictions rendered him ineligible for cancellation of removal as they were crimes involving moral turpitude. See App., *infra,* 25-26. The Board of Immigration Appeals sustained the Immigration Judge's decision and noted that even if one of his offenses falls under the "petty offense" exception, he still remains ineligible for cancellation of removal because he has one conviction for an offense to be a crime involving moral turpitude.[7] See App., *infra,* 19-20. While this case was pending in the Seventh Circuit, Mr. Abu

---

[6] A.R. refers to the Certified Administrative Record before the Seventh Circuit.

[7] The "petty offense exception" found at INA § 212(a)(2)(A)(ii)(II), provides that an alien is not inadmissible if "the maximum penalty possible for the crime of which the alien was convicted ... did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Hashish was granted a stay of removal and remains in the United States with his family.

C. Proceedings below

Pursuant to 8 U.S.C. § 1252, petitioner sought review following the Board of Immigration Appeal's final decision to the Seventh Circuit. The Seventh Circuit accepted jurisdiction as petitioner's argument centered on whether, as a matter of law, he is eligible to seek cancellation of removal and other forms of relief.[8]

The Seventh Circuit's resolution of petitioner's case centered on whether the offenses were crimes involving moral turpitude. The court employed its "categorical" approach framework to Mr. Abu Hashish's case and concluded that the statutes involved supported the use of the "categorical approach" and that the court and other courts of appeals have consistently held theft offenses to be crimes of moral turpitude. See App., *infra,* 7-8. The court examined only the Illinois statutes present and concluded that it contained the predicate knowledge required to be a crime involving moral turpitude.

The court expressly noted that in *Abdelqadar v. Gonzales,* 413 F.3d 668 (7th Cir. 2005), it was critical of decisions interpreting what are crimes involving moral turpitude, yet because that case utilized the "categorical approach" it was sufficient to analyze petitioner's crimes under the same approach. The court went on to list various circuits which have categorized theft offenses to be crimes involving moral turpitude. The court cited to "*Okoro v. INS,*

---

[8] Petitioner also challenged the Board of Immigration Appeal's finding that he was ineligible for voluntary departure. Although this issue was raised to the Seventh Circuit, for purposes of petitioner's Certiorari Petition, it will be limited to his eligibility for cancellation of removal.

125 F.3d 920, 926 (5th Cir. 1997)(following interpretation of the Board and other circuit courts in holding that "the crime of theft is one involving moral turpitude"); *Chiaramonte v. INS,* 626 F.2d 1093, 1097 (2nd Cir. 1980) ("It has long been acknowledged by this Court and every other circuit that has addressed the issue that crimes of theft, however they may be technically translated into domestic penal provisions, are presumed to involve moral turpitude."). See App., *infra,* 7-8.

Petitioner filed a Petition for Panel Rehearing En Banc to the Seventh Circuit on May 8, 2006 challenging the court's blanket finding, without more, that all theft offenses, and those in petitioner's case, involve moral turpitude. Specifically, that under the framework of the court's decisions in *Abdelqadar* and *Mei* it becomes necessary to analyze the particular aspects of the statute and the underlying record to determine whether the offense involves moral turpitude. *Abdelqadar*, *supra* at 672, *Mei,* 393 F.3d 737, 741 (7th Cir. 2004). In addition, because the offenses should be viewed as 'non-traditional' theft offenses, the court was required to provide further analysis than a straight employment of the categorical approach.

On June 6, 2006, the court denied rehearing en banc.

REASONS FOR GRANTING THE PETITION

A. The Federal Courts Continue To Grapple With What Crimes Involve Moral Turpitude.

There is no doubt that every circuit court agrees that since Congress failed to define the term "crime involving moral turpitude" when it relegated it to the Immigration context, that the Immigration Courts, Board of Immigration Appeals, and its own circuit struggles with how to define it and what approach to utilize in finding whether it falls into the same. Further, the circuits question how much deference

to give the Board of Immigration Appeals—the agency held responsible for interpreting it—and which crimes fall under its ambit. There can also be no doubt that classifying an individual's crime or crimes as involving moral turpitude has the grave result of removing or finding an individual inadmissible, deportable, or ineligible for relief from the United States for life.

The Board of Immigration Appeals has stated that moral turpitude refers to conduct that is "inherently base, vile or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *In re Danesh,* 19 I&N Dec. 669 (BIA 1988). The courts are required to give *Chevron* deference to an agency's interpretation provided it is a "permissible construction of the statute." *Chevron v. Natural Defense Resource Council, Inc.,* 467 U.S. 837, 843 (1984). The Board's use of this definition, therefore, in interpreting theft crimes to be "inherently base, vile or depraved", is acceptable only if it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. However, early Board decisions dealing with larceny and theft simply state, without more, that theft involves moral turpitude. *See In re De La Nues*, 18 I.&N. Dec. 140, 145 (BIA 1981) ("Burglary and theft or larceny, whether grand or petty, are crimes involving moral turpitude."); *In re Scarpulla*, 15 I. & N. Dec. 139, 140-41 (BIA 1974) ("It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude.").

Thus, the Board continues to categorically place theft offenses, regardless of the type and sentence imposed, as involving moral turpitude without providing any reasonable explanation or analysis as to how it would fit into the common law definition. On the other hand, the Board has held that other crimes against property such as unlawful entry or damage to private property somehow are not

"inherently base, vile or depraved," and thus, are not crimes involving moral turpitude. *See In re M,* 2 I&N Dec. 721 (Att'y Gen. 1946) (involving unlawful entry); *In re N,* 8 I&N Dec. 466 (BIA 1959)(involving criminal damage to private property). If the definition of a crime involving moral turpitude is that which is defined by the Board, and we must accept the Board's definition because Congress has provided no insight as to how it should be defined, it follows that the Board would need to elaborate on why certain offenses to property, particularly theft, would fall under the definition. Absent more, a person is left to speculate as to which acts would protect him or her from being inadmissible or which acts would result in an alien being ineligible to file for a form of relief that would prevent their permanent banishment from the United States and their United States citizen family members.

The circuit courts have similarly followed the Board's blanket approach in labeling theft offenses as involving moral turpitude. No statutory definition has ever been applied or thorough legal analysis used in finding such theft offenses fell under its terms. The courts have also adhered to following the Board's framework as to whether a conviction involves moral turpitude. *See e.g. Solano-Chicas v. Gonzales*, 440 F.3d 1050, 1056 (8th Cir. 2006)("If the statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for immigration purposes, and our analysis ends.") *quoting In re Ajami,* 22 I&N Dec. 949, 950 (BIA 1999). Further, those courts accepting this framework, will refuse to consider the specific acts involved in the underlying offense. *See Alleyne v.INS,* 879 F.2d 1177, 1185 (3rd Cir. 1989)("[T]he nature of an alien's crime is determined by the statute and record of conviction, not from the specific acts surrounding the conviction."); *Okabe v. INS,* 671 F.2d 863, 865 (5th Cir. 1982) ("Whether a crime involves moral turpitude depends upon the inherent nature of the crime, as

defined in the statute concerned, rather than the circumstances surrounding the specific offender's violation.").

On the one hand circuits are in agreement that there remains uncertainty and ambiguity surrounding what is "moral turpitude", yet they are willing to adopt blanket conclusions that a particular crime, such as theft, without review of even the basic underlying circumstances or elements of the crime, involves moral turpitude. However, the Fifth Circuit, in *Rodriguez-Castro,* went to great lengths in not only providing analysis as to the Board's definition of a crime involving moral turpitude, but concluded, through *de novo* review, that a state offense for misdemeanor child abandonment with intent to return the child was not a crime involving moral turpitude. *Rodriguez-Castro,* 427 F.3d 316 (5th Cir. 2005). In that case, the court discussed whether the underlying statute provided for acts which could or could not involve moral turpitude, and an explanation as to which activities under the statute would not implicate moral turpitude in coming to the conclusion that the particular state offense did not involve moral turpitude. *Id.* at 324. In addition, the First Circuit stated that it will often refer to the record of conviction, and not necessarily the acts to determine whether or not a crime involves moral turpitude. *See Cabral v. INS,* 15 F.3d 193, 195 (1st Cir. 1994). The circuit also stated that one of the tests it employs is "whether the act is accompanied by a vicious motive or a corrupt mind." *Maghsoudi v. INS,* 181 F.3d 8, 14 (1st Cir. 1999). This further clarifies the different approaches and standards the varying courts are using in attempting to find whether or not such crimes constitute the term crime involving moral turpitude.

In another instance, Judge Calabresi's dissent in a case from the Second Circuit, illustrates that no matter how much the majority wished to utilize the categorical approach

in determining whether a crime of possession of stolen property involves moral turpitude, the Board of Immigration Appeals still failed to provide a reason for why it was choosing to adopt the categorical approach and simply could not justify why all violations of that particular statute entailed moral turpitude. *Michel v. INS,* 206 F.3d 253, 269 (2nd Cir. 2000). Further, Judge Calabresi states:

> To describe a practice [] is not to justify it or to explain it. As a result, to say, as the BIA did, that it has consistently held that knowing possession of stolen property constitutes moral turpitude, even if true, i[s] not enough. And the fact that the majority thinks that a categorical approach to moral turpitude is a good one, and spends considerable time explaining why, is of no help either. *Id.*

Such analysis is precisely what the courts have employed in the area of theft offenses, even when non-traditional theft offenses are involved, such as theft of a recordable sound or purchase of stolen property.

Yet, the Seventh Circuit has likewise attempted to patch together a workable definition for a crime involving moral turpitude in lieu of the Board of Immigration Appeals reliance on those crimes that are inherently base, vile, or depraved. In *Mei v. Ashcroft,* 393 F.3d 737, 740-41 (7th Cir. 2004), the court examined and disposed of the appropriateness in establishing a definition for crimes involving moral turpitude on the distinction of whether an offense is *malum in se, malum prohibitum,* or involves "evil intent." The *Mei* court seems to settle on a determination as to whether the general crimes are (1) serious crimes in terms either of the magnitude of loss that they cause or the indignation they arouse in the law abiding public, that are (2) deliberate, because a person deliberately commits a serious

crime, is regarded as behaving immorally and not merely illegally. *Id.*

B. Review Is Also Warranted Because The Decision Of The Seventh Circuit Fails To Undertake Any Analysis Of The Underlying Convictions In Concluding The Offenses To Be Crimes Involving Moral Turpitude.

This Court's review is not only necessary because the courts will continue to grapple with what a crime involving moral turpitude entails but also because the court of appeals in this case erred in its decision. The Seventh Circuit's employment of the categorical approach to petitioner's case fails to provide any rationale as to how petitioner's offenses involve moral turpitude. The court simply concludes that both of Mr. Abu Hashish's crimes "involve actions traditionally considered 'theft', and therefore, are crimes of moral turpitude for purposes of the immigration laws." See App., *infra,* 9. No discussion is taken as to how his crimes are "traditionally theft" offenses and even if they are, what particular actions or elements of the statute are present to classify them as crimes involving moral turpitude. The explanation the court provides is simply conclusory and does not offer any guidance as to why it is so.

In his brief to the court, petitioner provides alternative explanations as to how the offense of theft of a recordable sound falls under the purview of conduct not deemed to involve moral turpitude. In so doing, your petitioner argues by analogy to determine the level of "public indignation" cause by theft of a recordable sound in order to demonstrate the morality involved in committing like offenses. Specifically, that it is akin to downloading music via the internet, a practice in which an estimated 60 million Americans engage. *See Wall Street Journa*l, July 3, 2002. The court utilized a similar analysis in the case of *Solorzano-*

Potlan v. INS, 207 F.3d 869, 875 (7th Cir. 2000) to determine if the offense was, in that case, a crime of violence and concluded that the goal is to determine what the accused was convicted of, not what he did in fact. *See also United States v. Lewis*, 405 F.3d 511, 515 (7th Cir. 2005). In determining whether the offense in question is particularly serious and deliberate so as to cause public indignation, it was argued that the court must look at a myriad of conduct to be connected under elements of the statute in order to make such determination.

The court's decision also deviates from its view as to what are traditional theft offenses, in that theft traditionally relates to offenses such as strong armed robbery and theft of merchandise from a store. *See Dashto v. INS*, 59 F.3d 697, 699 (7th Cir. 1995) and *Soetarto v. INS*, 516 F.2d 778, 780 (7th Cir. 1995). In the court's decision, it recognizes that petitioner's offenses are "traditionally considered" theft offenses, yet, the court offers no explanation as to how theft of a recordable sound or receipt of stolen property is similar to traditional theft offenses such as robbery.

Although there is little information in the record concerning petitioner's offense for theft of a recordable sound, his conviction for purchasing stolen property contains information in the record which would challenge a finding that it involves moral turpitude as it is defined. Petitioner purchased property for his business from an individual who he later discovered to be an undercover police officer, and to later find that the property, after purchasing it, was stolen. See A.R. 68. The question posed is whether this offense is serious and deliberate as to arouse public indignation. In fact, both of petitioner's offenses were minor and they resulted in small fines and a sentence of probation.

The analysis which the Seventh Circuit undertook in *Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004), is particularly

useful in petitioner's case. Although the court in that case came to the conclusion that an Illinois offense for aggravated fleeing from a police officer was a crime involving moral turpitude, it stressed that to give *Chevron* deference to the Board's definition of moral turpitude, "has no practical significance." *Id.* at 739. Judge Posner, in that case, wrote that the issue of deciding which crimes involve moral turpitude "divides the courts" and that "resolution of that issue depends on whether the character, the gravity, the moral significance of particular crimes is a topic that Congress, had it thought about the matter, would have wanted the Board to decide rather than the courts." *Id.* Judge Posner concluded that since there is absolutely no legislative intent which can be discerned, ultimately the Board's determination must be upheld. Thus, the court was left with no alternative but to utilize a categorical approach to determine whether that particular offense was a crime involving moral turpitude.

C. The Issue Is One Of Substantial Practical Importance.

1. Uniformity

Absent this Court's intervention, defining crime of moral turpitude impacts all aliens. Knowing what is a crime involving moral turpitude and what crimes are likely to be considered under the definition provides some degree of certainty to an alien who is seeking reentry to the United States as a lawful permanent resident, applying for a visa at a U.S. Consulate or Embassy, either as a non-immigrant or immigrant, and for those aliens already in the United States applying for adjustment of status or relief from removal, as in this case. Further, and in many instances, an Immigration Judge or Court is not the individual in charge with determining whether a particular crime is a crime involving moral turpitude. Consular officials, border patrol agents and

immigration examiners are often the individuals responsible for adjudicating a case or deciding if an alien is allowed to enter the United States. If the courts of appeal are having difficulty defining the term, surely a layperson would likewise struggle. In addition, since the definition requires one to view the accepted rules of morality, variances of interpretation for the same offense is likely to be present from one adjudicator to another. In fact Justice Jackson expressed his concerns about uniformity over fifty years ago and stated:

> "Can we accept 'the moral standards that prevail in contemporary society' as a sufficiently definite standard for the purposes of the Act? This is a large country and acts that are regarded as criminal in some states are lawful in others. We suspect that moral standards which prevail as to possession or sale of liquor that has evaded tax may not be uniform in all parts of the country, nor in all levels of 'contemporary society.' How should we ascertain the moral sentiments of masses of persons on any better basis than a guess?"

Jordan v. De George, 341 U.S. 223, 237-38 (1951). In another instance, Justice Jackson notes, "How many aliens have been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess. That is not government by law." *Id.* at 239-40. Having a workable definition that will allow an adjudicator of an application a framework to apply will not only allow for more consistent decisions, but will also insure that fundamental standards of fairness evolve from jurisdiction to jurisdiction.

2. Vagueness

To determine whether a statute is so vague that it is a denial of due process, courts will decide if the statute provides notice to an individual as to the consequences of violating it. *See generally Jordan v. De George,* 341 U.S. 223, 229(1951). But the analysis does not stop there, and courts must also balance competing interests of the ambiguous nature of the statute with the impact it has upon protected conduct. It is argued, that the *Jordan* majority did not reach the second aspect of this analysis when it found the term crime involving moral turpitude not to be void for vagueness. As Justice Jackson stresses in the dissent, one must look to the impact that not having a definition of crime involving moral turpitude has in that, for that petitioner:

> he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of a crime. *Id.* at 243.

At the minimum, the Board of Immigration Appeals must explain why a particular offense falls into a category of crimes which are deemed to involve moral turpitude. As Judge Calabresi explains, "[r]equiring the [Board of Immigration Appeals] to [explain why a specific statute fits into an applicable category] is not indulging in abstract hypotheticals ... . It is simply asking the [Board of Immigration Appeals] to consider what the minimum conduct needed to violate a statute is, and to decide whether that conduct is morally turpitudinous." *Michel v. INS,* 206 F.3d 253, 270 (2nd Cir. 2000).

In this case, petitioner is now being removed from the United States and from his family, consisting of five United States Citizen children, a business he has owned and operated for years and a life he has lived in the United States since his admission in 1990, to a life of permanent banishment from the United States. In addition, even if he one day is eligible to file for permanent residency based upon a visa petition by a family member, he will be ineligible to receive a visa to return to the United States as he will continue to be inadmissible for having been convicted of a crime involving moral turpitude under INA § 212(a)(2)(A)(i).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey A. Kriezelman*
Justin R. Burton
Saadia Siddique
KRIEZELMAN & ASSOCIATES, LTD.
20 North Clark Street
Suite 725
Chicago, IL 60602
(312) 332-2550

Counsel for Petitioner
Mohammad Abu Hashish

*Counsel of Record

August 30, 2006

In the
United States Court of Appeals
for the Seventh Circuit

No. 05-2266

MOHAMMAD ABU HASHISH,
Petitioner,

v.

ALBERTO R. GONZALES,
Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals.
No. A77-651-325

ARGUED JANUARY 13, 2006 – DECIDED
MARCH 24, 2006

Before RIPPLE, KANNE and ROVNER, Circuit Judges.

RIPPLE, Circuit Judge. Petitioner Mohammad Abu Hashish seeks review of an adverse decision of the Board of Immigration Appeals (the "BIA" or "Board") that denied his request for cancellation of removal and voluntary departure. For the reasons set forth in the following opinion, we affirm the decision of the BIA and dismiss the petition.

I.

BACKGROUND

A. Facts

Mr. Abu Hashish is a Jordanian who originally was admitted to the United States on February 5, 1990, on a visitor's visa. Upon entering this country, Mr. Abu Hashish first worked as a stock boy, and then as a street vendor. In 1992, Mr. Abu Hashish began distributing candy to grocery stores. From 1994 to 2000, he owned and operated two different stores.

In November 1992, Mr. Abu Hashish pleaded guilty to theft of a recordable sound in violation of Illinois Criminal Code 38-16-1, *see* 720 ILCS 5/16-1;[1] he was sentenced to one year probation and was required to pay restitution. A.R. 271-72. In 1999, Mr. Abu Hashish again was charged with theft, specifically obtaining or exerting unauthorized control over the property of another, in violation of 720 ILCS 5/16- l(A)(1); on December 16, 2002, he pleaded guilty to this misdemeanor charge. Mr. Abu Hashish was given a "conditional discharge sentence" of two years and was required to pay restitution in the amount of $2,150. A.R. 269.

B. Administrative Proceedings

In June 2000, the former Immigration and Naturalization Service ("INS") issued Mr. Abu Hashish a notice to appear. At an April 20, 2001 hearing before an

---

[1]No further details concerning this crime are contained in the record.

Immigration Judge ("IJ"), Mr. Abu Hashish conceded removability but sought cancellation of removal. *See* 8 U.S.C. § 1229b. A hearing on his claim for relief was continued several times to allow counsel for Mr. Abu Hashish and for the Government to obtain documentation regarding the disposition of criminal charges against him. The IJ also suggested that Mr. Abu Hashish's counsel explore other avenues of relief should Mr. Abu Hashish's convictions render him statutorily ineligible for cancellation of removal. At a subsequent hearing, the IJ confirmed his receipt of a brief filed by Mr. Abu Hashish, which continued to assert his eligibility for cancellation of removal, as well as of other documents from the parties concerning Mr. Abu Hashish's convictions.

In a decision issued on April 22, 2004, the IJ determined that both Mr. Abu Hashish's 1992 and 2002 theft convictions constituted crimes of moral turpitude. Mr. Abu Hashish, therefore, was statutorily ineligible for cancellation of removal. The IJ also determined that, in light of these crimes, Mr. Abu Hashish had not established good moral character for the requisite number of years necessary to qualify for a grant of voluntary departure. *See* 8 U.S.C. § 1229c. Mr. Abu Hashish appealed to the BIA.

In a written opinion dated April 23, 2005, the BIA affirmed the IJ's decision. The BLA rejected Mr. Abu Hashish's argument that the IJ should have conducted "an inquiry into the nature of the respondent's theft convictions to determine whether such convictions in fact constitute crimes involving moral turpitude." A.R. 3. The BIA stated that "[i]t is well settled that theft, regardless of the sentenced [sic] imposed or the amount stolen, is a crime involving moral turpitude." *Id.* Furthermore, because both of Mr. Abu Hashish's crimes fell into this category, he could not invoke the exception available for individuals who had committed

only one "petty offense" as defined by statute. *See id.* (citing 8 U.S.C. § 1182(a)(2)(A)(ii)(II)). Finally, the BIA stated that, "in light of the respondent's most recent theft conviction, the Immigration Judge properly found that the respondent failed to establish his eligibility for voluntary departure." *Id.*

II.

ANALYSIS

A. Jurisdiction

Generally speaking, this court has jurisdiction to review final orders of removal under 8 U.S.C. § 1252. However, this court does not have jurisdiction to review the discretionary decision of the Attorney General to grant (or deny) cancellation of removal or voluntary departure. *See* 8 U.S.C. § 1252(a)(2)(B)(I). Despite this prohibition, we do have jurisdiction to review nondiscretionary determinations relating to an alien's eligibility for relief. *See, e.g., Morales-Morales v. Ashcroft*, 384 F.3d 418, 421-23 (7th Cir. 2004) (holding that the meaning of the term continuous physical presence for purposes of cancellation of removal is a nondiscretionary question of statutory interpretation). We also may review constitutional questions and questions of law raised in a petition for review of a final removal order. *See* 8 U.S.C. § 1252(a)(2)(D). Because Mr. Abu Hashish's claims with respect to both cancellation of removal and voluntary departure raise questions of law, we have jurisdiction to review those claims.

B. Cancellation of Removal

1.

Mr. Abu Hashish argues that the BIA erred when it deemed his theft convictions "crimes of moral turpitude," which rendered him ineligible for cancellation of removal. Before evaluating Mr. Abu Hashish's specific claims, we turn briefly to the statutory requirements for cancellation of removal. *See id.* § 1229b(b)(1). Section 1229b(b)(1) provides:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien–
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2) [crimes of moral turpitude or drug-related crimes], 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship

> to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Section 1229b goes on to state that any period of physical presence shall be deemed to end when the "alien has committed an offense referred to in section 1182(a)(2)"– a crime of moral turpitude or a drug-related offense. *Id.* § 1229b(d)(1). With these standards in mind, we turn to Mr. Abu Hashish's claims on appeal.

On the issue of whether his crimes constitute crimes of moral turpitude,[2] Mr. Abu Hashish submits that the Board should have looked beyond the crimes charged to his underlying conduct to determine whether his crimes fall within this category. Mr. Abu Hashish analogizes his first conviction – for theft of a recordable sound – to downloading music over the internet. This type of activity, Mr. Abu Hashish maintains, does not arouse indignation in the general populace and, therefore, should not be considered a crime of moral turpitude. With respect to his second conviction, receiving stolen property, Mr. Abu Hashish suggests that, because a defendant could be convicted for this crime absent actual knowledge that the property was stolen, it does not entail the moral culpability usually associated with crimes of moral turpitude.

---

[2]As we recently observed in *Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004), there is a split among the circuits regarding the level of deference owed to the BIA's decision to classify a particular crime as one "involving moral turpitude." In *Mei*, we found it unnecessary to decide the question because regardless of the level of deference – very great or none at all – the Board's determination that the crime at issue involved moral turpitude had to be upheld. We are in a similar situation here: Absent any deference to the BIA's classification of Mr. Abu Hashish's crimes, we still would reach the conclusion that his crimes of theft are crimes of moral turpitude.

We believe that Mr. Abu Hashish's arguments ignore the framework that we have established for analyzing whether a crime is one of moral turpitude for purposes of the immigration laws. We recently restated that framework in *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005):

> In determining whether a crime involves moral turpitude, we employ a "categorical" approach; that is, we determine whether a given crime necessarily involves moral turpitude by examining only the elements of the statute under which the alien was convicted and the record of conviction, not the circumstances surrounding the particular transgression. This practice is intended to promote uniformity and avoid the oppressive administrative burden of scrutinizing the specific conduct giving rise to criminal offenses.

Id. at 1019 (internal citations and quotation marks omitted). Other circuits follow the same approach. *See Vuksanovic v. United States Attorney General,* 2006 WL 358659, at *2 (11th Cir. Feb. 17, 2006) ("[T]he determination that a crime involves moral turpitude is made categorically based on the statutory definition or nature of the crime, not the specific conduct predicating a particular conviction."); *Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013, 1017 (9th Cir. 2005) (using a categorical approach to determine whether a crime constitutes moral turpitude); *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 320 (5th Cir. 2005) (stating that, in determining whether a crime is a crime of moral turpitude, "we look to the statutory crime definition as interpreted by the state's courts, without regard to the particular circumstances surrounding the specific offender's

violation"); *Partyka v. Attorney Gen. of the United States,* 417 F.3d 408, 411 (3d Cir. 2005) ("Whether an alien's crime involves moral turpitude is determined by the criminal statute and the record of conviction, not the alien's conduct."); *Dalton v. Ashcroft,* 257 F.3d 200, 204 (2d Cir. 2001) ("[W]e have long endorsed categorical analyses of criminal statutes in the context of deportation orders for crimes of moral turpitude."). This court, and other courts of appeals, repeatedly have held that "theft" is a crime of moral turpitude. *Soetarto v. INS,* 516 F.2d 778, 780 (7th Cir. 1975) ("Theft has always been held to involve moral turpitude, regardless of the sentence imposed or the amount stolen."); *see also Cuevas-Gaspar,* 430 F.3d at 1020 ("We have held that crimes of theft or larceny are crimes involving moral turpitude."); *Nugent v. Ashcroft,* 367 F.3d 162, 165 (3d Cir. 2004) (holding that the alien's convictions for thefts involved crimes of moral turpitude); *Okoro v. INS,* 125 F.3d 920, 926 (5th Cir. 1997) (following interpretation of BIA and other circuit courts in holding that "the crime of theft is one involving moral turpitude"); *Chiaramonte v. INS,* 626 F.2d 1093, 1097 (2d Cir. 1980) ("It has been long acknowledged by this Court and every other circuit that has addressed the issue that crimes of theft, however they may be technically translated into domestic penal provisions, are presumed to involve moral turpitude.").

Applying this approach to the present case, it is clear that both of Mr. Abu Hashish's crimes fall into this category. Mr. Abu Hashish's initial conviction is for theft of a recorded sound under the Illinois theft statute, formerly codified at Illinois Criminal Code 38-16-1. Although Mr. Abu Hashish's record of conviction does not reflect the subsection under

which Mr. Abu Hashish was convicted,[3] the subsections are indistinguishable with respect to the state of mind required for conviction: Each of the subsections involves the knowing exertion of authority or control over the property of another.

The same is true for Mr. Abu Hashish's second conviction in 2002. Mr. Abu Hashish was convicted of misdemeanor theft under 720 ILCS 5/16-l(a), part of the recodified "theft" chapter of the Illinois code, which involves "knowingly" "obtain[ing] or exert[ing] unauthorized control over property of the owner."[4] Thus, both of Mr. Abu Hashish's crimes involve actions traditionally considered "theft" and, therefore, are crimes of moral turpitude for purposes of the immigration laws.

Despite this well-established approach, Mr. Abu Hashish maintains that our recent decision in *Abdelqadar v. Gonzales,* 413 F.3d 668 (7th Cir. 2005), requires that we look at his specific actions, as opposed to the elements of the crime of conviction, to determine whether the crime committed involved moral turpitude. *See* Appellant's Br. at 11-12. We do not believe that *Abdelqadar* supports Mr. Abu Hashish's position. Although *Abdelqadar* is critical of some

---

[3]Mr. Abu Hashish did not submit to the IJ the charging papers for either of his crimes.

[4]Although not designated in the record of conviction, Mr. Abu Hashish describes this conviction as being for possession of stolen property. 720 ILCS 5/16-l(a) states that "[a] person commits theft when he knowingly: . . . [o]btains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen. . . ." Even if Mr. Abu Hashish was convicted under this subsection, receiving stolen property requires the same state of mind, "knowingly," as other crimes of theft, and has been recognized as a crime of moral turpitude. *See, e.g., Smirko v. Ashcroft,* 387 F.3d 279, 283 (3d Cir. 2004).

of this court's decisions discussing crimes of moral turpitude, the court nevertheless applied the categorical approach in determining that Abdelqadar's crimes – purchasing food stamps from welfare recipients – fell within this category. *See Abdelqadar,* 413 F.3d at 672 ("The goal is to determine what the accused was convicted of, not what he did in fact, so the scope of the inquiry is correspondingly limited."). Consequently, *Abdelqadar* does not suggest that a different analysis should be applied in the present case.[5]

---

[5]Mr. Abu Hashish also claims that, even if one of his crimes is deemed a crime of moral turpitude, that crime falls within the "petty crime" exception set forth at 8 U.S.C. § 1182(a)(2)(A)(ii). Section 1182(a)(2)(A)(ii) provides that a crime of moral turpitude shall not render an alien inadmissible (and, therefore, ineligible for cancellation of removal) if:

> (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
>
> (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

8 U.S.C. § 1182(a)(2)(A)(ii).

However, Mr. Abu Hashish concedes that, if both of his crimes are crimes of moral turpitude, he may not invoke this statutory exception.

C. Voluntary Departure

Mr. Abu Hashish also argues that the BIA applied the incorrect standard in determining whether he was eligible for voluntary departure. Mr. Abu Hashish maintains that, because he requested voluntary departure from the outset of his proceedings, the BIA should have evaluated his voluntary departure claim according to the standards for grants made "prior to the completion of. . . proceedings," as opposed to the standards for grants of voluntary departure made "at the conclusion of a proceeding." *See* 8 U.S.C. § 1229c(a)(1)[6] & (b)(1).[7]

See Appellant's Br. at 20 n.5. Consequently, we have no occasion to consider whether either of his convictions, standing alone, may fall within this exception.

[6]8 U.S.C. § 1229c(a)(1) states: "The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii)."

[7]8 U.S.C. § 1229c(b) states:

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that--

(A) the alien has been physically present in the United States for a period of at least one

The immigration laws distinguish between a grant of voluntary departure at these different stages of removal proceedings. An IJ may grant voluntary departure prior to the completion of proceedings so long as the alien is not deportable based on the commission of an aggravated felony, *see id.* § 1227(a)(2)(A)(iii), or based on involvement in terrorist activities, *see id.* § 1227(a)(4)(B). *Id.* § 1229c(a)(1). An IJ may grant voluntary departure at the conclusion of proceedings as well; however, in order to do so, the IJ must make additional findings that (1) the alien has been physically present in the United States for one year, (2) "the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure," and (3) the alien has the means and intent to depart the United States. *Id.* § 1229c(b)(1).

As noted above, Mr. Abu Hashish believes that, because he requested voluntary departure at the master

---

year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

calendar hearing,[8] his request should have been evaluated according to the standards for grants of departure made prior to the completion of proceedings. However, the regulations implementing § 1229c make clear that the timing of a request, standing alone, does not guarantee that the standards for grants of departure "prior to the completion of such proceedings" will govern the request. 8 C.F.R. § 1240.26 provides in relevant part:

> § 1240.26 Voluntary departure-authority of the Executive Office for Immigration Review.
>
> ...
>
> (b) Prior to completion of removal proceedings–
>
> (1) Grant by the immigration judge.
>
> (i) An alien may be granted voluntary departure by an immigration judge pursuant to section 240B(a) of the Act only if the alien:
>
> (A) Makes such request prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing;

---

[8]Mr. Abu Hashish does not identify, by reference to the Administrative Record, when this request took place, and we have been unable to locate the request in the record. However, the Government does not dispute that the request was made, and, therefore, we shall presume for purposes of this discussion that such a request was indeed made at the master calendar hearing.

> (B) Makes no additional requests for relief (or if such requests have been made, such requests are withdrawn prior to any grant of voluntary departure pursuant to this section);
>
> (C) Concedes removability;
>
> (D) Waives appeal of all issues; and
>
> (E) Has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4)...

Thus, Mr. Abu Hashish's timely request, standing alone, was not sufficient to make a grant of departure prior to the conclusion of proceedings available to him. He also was required to forego (or withdraw) requests for additional relief and to waive all issues on appeal. Absent these actions, which Mr. Abu Hashish did not take, an IJ could not have granted Mr. Abu Hashish voluntary departure "prior to the completion of. . . proceedings."[9] Consequently, we do not believe that the BIA applied the incorrect standard when it evaluated Mr. Abu Hashish's eligibility for voluntary departure based on the requirements for grants "at the conclusion of a proceeding."

---

[9]Mr. Abu Hashish does not argue that the INS exceeded its authority in adopting the regulation.

Mr. Abu Hashish makes one final argument with respect to the denial of voluntary departure. He maintains that, even if his request was subject to the more stringent requirements for grants of voluntary departure at the conclusion of proceedings, *see* 8 U.S.C. § 1229c(b)(1), the BIA did not employ the correct standard in determining whether he had established "good moral character." According to Mr. Abu Hashish, the BIA should have looked beyond his convictions to numerous other factors in making this assessment. Again, however, Mr. Abu Hashish's argument ignores the statutory requirements. Although a precise definition of "good moral character" is not set forth in the statute, the statute does preclude a finding of "good moral character" under certain circumstances. 8 U.S.C. § 1101(f) provides:

> No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was–
>
> ...
>
> (3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed

during such period...

8 U.S.C. 1101(f)(3). For its part, § 1182(a)(2)(A) declares inadmissible "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." *Id.* § 1182(a)(2)(A). Thus, as a matter of law, an alien convicted of a crime of moral turpitude within the applicable time period is not a person of good moral character. As we have noted earlier, Mr. Abu Hashish's 2002 conviction involved a crime of moral turpitude and prevented him from establishing "good moral character" at the time his proceedings concluded. The BIA, therefore, did not commit an error of law in determining that Mr. Abu Hashish was statutorily ineligible for voluntary departure based on this conviction.

Conclusion

For the foregoing reasons, the petition for review is denied, and the judgment of the BIA is affirmed.

PETITION DENIED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 6, 2006

Before

Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA D. ROVNER, Circuit Judge

No. 05-2266

Petition for Review of an Order of the
Board of Immigration Appeals.

MOHAMMAD ABU HASHISH,
Petitioner,

v.

ALBERTO R. GONZALES,
Respondent.

ORDER

Upon consideration of Petitioner's petition for rehearing en banc, filed on May 8, 2006, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A77 651 325 - Chicago Date: APR [illegible] 2005

In re: MOHAMMAD QASEM ABUHASHIH

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT: Justin R Burton, Esquire
ON BEHALF OF DHS: Micheal L. Harper
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Cancellation of removal; voluntary departure

The respondent, a native and citizen of Jordan, appeals from the Immigration Judge's April 22, 2004, decision finding the respondent statutorily ineligible for cancellation of removal and voluntary departure and denying the respondent's application for such relief. The appeal will be dismissed.

The record reveals that on November 2, 1992, the respondent plead guilty to and was convicted of the crime of misdemeanor theft in violation of 38 Ill. Comp. Stat. section 16-1 (1992), and was sentenced to 1 year of probation and required to pay restitution (Exhs. 3, 3A). On December 16,

2002, the respondent again plead guilty to and was convicted of the crime of misdemeanor theft inviolation of 720 Ill. Comp. Stat. section 5/16-l(a)(1) (2002), and was sentenced to a 2-year period of conditional discharge and required to pay restitution (Exhs. 4, 4A).

The respondent on appeal argues, inter alia, that the Illinois theft statute is divisible as a person could be convicted of theft for possessing stolen property without knowledge that such property was stolen because the statute includes "reasonable belief" language.[1] Thus, the respondent asserts that the Immigration Judge erred in not conducting an inquiry into the nature of the respondent's theft convictions to determine whether such convictions in fact constitute crimes involving moral turpitude. We disagree.

It is well settled that theft, regardless of the sentenced imposed or the amount stolen, is a crime involving moral turpitude. *See Dashto v. INS*, 59 F.3d 697, 699 (7th Cir. 1995) (citing *Soetarto v. INS*, 516 F2d. 778, 780 (7th Cir. 1975); *see also Matter of De La Nues*, 18 I&N Dec. 140, 145 (BIA 1981). Contrary to the respondent's assertions, although the statute eliminates the necessity of guilty knowledge by direct proof, guilty knowledge is an essential element for the Illinois offense of theft – possession of stolen property. *See People v. Dabrowski*, 515 N.E.2d 1345 (Ill. App. Ct. 1987); *see also Matter of R*, 6 I&N Dec. 772 (BIA 1955) (recognizing guilty knowledge may be inferred simply from the possession of stolen goods where, as here, the

---

[1]A person commits theft when "he knowingly: (1) Obtains or exerts unauthorized control over property of the owner, or... (4) Obtains control over stolen property knowing the property to have been stolen *or under such circumsttances as would reasonably induce him to believe* that the property was stolen." 720 Ill. Comp. Stat. section 5/16-1 (2002); 38 Ill. Comp. Stat. section 16-1 (1992) (emphasis added).

statute permits such an inference from certain circumstances). Thus, regardless of the behavior underlying the conviction, *i.e.,* theft of a recording sound or theft for possessing stolen property, a conviction for theft under either 720 Ill. Comp. Stat. section 5/16-1 (2002), or 38 Ill. Comp. Stat. section 16-1 (1992), is sufficient to support a finding of moral turpitude. *See, e.g., Matter of Salvail*, 17 I&N Dec. 19 (BIA 1979) (holding that possession of stolen goods is a conviction for a crime involving moral turpitude where the statute under which the alien was convicted specifically requires knowledge of the stolen nature of the goods); *Matter of R, supra.* Consequently, the respondent's theft convictions constitute crimes involving moral turpitude.

Therefore, even if one of the respondent's convictions falls within the "petty offense" exception in section 212(a)(2)(A)(ii)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II), the respondent still has a conviction for an offense that renders him statutorily ineligible for cancellation of removal. *See* section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C); *see generally Matter of Deanda-Romo,* 23 I&N Dec. 597 (BIA 2003). Furthermore, in light of the respondent's most recent theft conviction, the Immigration Judge properly found that the respondent failed to establish his eligibility for voluntary departure. *See* section 240B(b)(1)(B) of the Act, 8 U.S.C. § 1229c(b)(1)(B).

On whole, the record supports the Immigration Judge's resolution. Accordingly, we will enter the following order:

ORDER: The respondent's appeal is dismissed.

/s/
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File Number: A 77 651 325 April 22, 2004

In the Matter of:

MOHAMMAD QASEM ABUHASHIN,
Respondent IN REMOVAL PROCEEDINGS

CHARGE: Section 237 (a) (1) (B) of the INA, remained longer than allowed.

APPLICATION: Cancellation of removal pursuant to Section 240A(b) and voluntary departure.

ON BEHALF OF RESPONDENT:

Jeffrey Kriezelman, Esquire
20 North Clark, Suite 725
Chicago, Illinois 60602

ON BEHALF OF THE DEPARTMENT:

Ellen Jo Krupp, Esquire
Department of Homeland Security
55 East Monroe, Suite 1700
Chicago, Illinois 60603

[DATE STAMP
JUL 30 2004]

ORAL DECISION OF THE IMMIGRATION JUDGE

Background

The respondent is a 43 year old male native and citizen of Jordan who initially was admitted to the United States at Chicago, Illinois on or about February 7, 1990 as a visitor for pleasure. At that time the respondent had authorization to remain in the United States for a temporary period not to exceed six months. The respondent was allowed to remain in the United States up until August 7, 1990. Due to the fact that the respondent remained longer than allowed, the Department of Homeland Security commenced removal proceedings charging the respondent as being removable pursuant to the above captioned Section of the Immigration and Nationality Act ("the Act").

The respondent was placed under removal proceedings before 2000. The record reflects that the respondent was personally served with the Notice to Appear on that date.

The respondent, through counsel, has admitted the factual allegations contained in the Notice to Appear and conceded removability. This was back on April 20, 2001. The respondent did designate Jordan as the country of removal, consequently removability has been established by clear and convincing evidence as required by the Act in pertinent regulations. 8 CFR Section 1240.8 Dopin (2003).

Respondent's Request for Relief

The respondent has submitted a request for cancellation of removal for certain non-permanent aliens pursuant to Section 240A(b) of the Act. Alternatively the respondent requests an opportunity to apply for voluntary

departure.

Contention in the Department of Homeland Security

The Department argues that the respondent is ineligible from cancellation of removal eligibility based on two offenses which occurred in the 1990's. According to the Department the respondent was convicted of two theft related offenses. One in 1992 and the other in 1999 which disqualified the respondent from cancellation of removal.

The Department also argues that the respondent cannot establish good moral character so as to warrant the privilege of voluntarily departing the United States.

Conclusions of Law

In order to be eligible for cancellation of removal for non-permanent residents an applicant must establish the following elements: (A) That the alien has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (B) He has been a person of good moral character during such period; (C) He's not been convicted of any offenses under Section 212 (a) (2), 237 (a) (2) or 237 (a) (3); and (D) He establishes that his removal would result in exceptional and extremely unusual hardship to his spouse, parent or child who are citizens or aliens lawfully admitted for permanent residence in the United States. See Section 240A(b) of the Act; see also 8 CFR Section 1240.20 (2003).

Discussion of the Evidence

The Department as well as the respondent have submitted documents in order to support their respective positions about the respondent's eligibility for cancellation of

removal. Exhibit 2 is a copy of an FBI identification record which pertains to the respondent. The Department asserts that the respondent was arrested in 1992 by the Chicago police department for a theft offense relating to a theft of sound. The Department also submits that the FBI report indicates that the respondent was arrested in a separate matter in the city of Maywood, Illinois for an offense related to theft.

The record contains a copy of a certified statement of conviction/disposition in a case entitled *Illinois v. Mohammad Abu Hashis,* case number 92CR2077801.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

The certified statement of conviction reflects that the respondent was charged with a theft offense pursuant to the then Illinois Revised Statutes at Chapter 38-16-1. See Exhibit 3. This document reflects that the respondent on November 2, 1992, entered a plea of guilty. Waived his right to a jury trial and consequently was given probation for a period of one year. The respondent was also required to pay restitution. The record does reflect that the respondent on April 16, 1993 had his probation terminated satisfactorily. The Department submitted at Exhibit 3A a copy of the pertinent state statute which defines theft as follows: Theft is committed when (a) person commits theft when he knowingly (1) obtains or exerts unauthorized control over property of the owner. The record further reflects that the offense is a misdemeanor offense indicating that the maximum possible penalty is less than one year of imprisonment in Illinois.

The Department has submitted a copy of a second offense entitled *Illinois v. Abu M. Hashish,* case number 99C22067601. This certified statement of conviction/disposition reflects that the respondent was processed for this criminal violation on November 5, 1999. The respondent was charged with violating the Illinois compiled statutes at 720-5/16-1(A)(1). The designation on the certified statement of conviction is that this is a felony offense. The record further reflects that the respondent changed his plea of not guilty to a plea of guilty on December 16, 2002. Based on his plea of guilty the respondent was sentenced to pay restitution and sentenced to a conditional discharge for a period of two years. This occurred on December 16, 2002. Exhibit 4 is a copy of the Illinois Compiled Statutes at Section 5/16-1. Theft here is defined as follows: Theft is committed when a person knowingly: (1) obtains or exerts unauthorized control over property of the owner. The Act at 5/16-1(b) further reflects that a person who has been previously convicted of any type of theft is guilty of a class 4 felony.

Review of both of these offenses which were committed in 1992 and 1999 reflects that the respondent was convicted under the identical statute. The numbering of the statutes were changed given the revision of the law and the fact that the Illinois revised statutes were compiled between 1992 and 1999.

The respondent nonetheless asserts that he is eligible for cancellation of removal because he's not been convicted of a crime involving moral turpitude. See respondent's brief at Exhibit 5. In essence the respondent argues that the 1992 offense for theft of a recording sound is not a crime involving moral turpitude. The respondent further cites the *Matter of Franklin,* 20 I&N Dec. 867, 868 (BIA 1994) as well as *Matter of Flores,* 17 I&N Dec. 225, 227 (BIA 1980).

These cases are cited for the proposition that evil intent is a prerequisite in order to establish a crime involving moral turpitude. Despite the citations provided by the respondent it is clear to this Judge that the respondent has been convicted of depriving other individuals of their property. It is clear that theft is a crime involving moral turpitude. Despite the fact that the first offense was a misdemeanor and the subsequent offense was a felony, it is clear that the respondent is statutorily ineligible for cancellation of removal because he does not have the good moral character necessary as set out in the Act and he has been found guilty of two offenses which preclude him of establishing eligibility for cancellation of removal. Consequently his request for cancellation is denied.

The respondent alternatively seeks voluntary departure however Section 240B (b) (1) (B) indicates that an individual must have good moral character for the five years immediately preceding the date of his request for voluntary departure. The respondent entered a plea of guilt to his second theft offense in December 16, of 2002. On this date as is reflected in Exhibit 4 the respondent did enter a plea of guilt to his second theft offense. Consequently the respondent is not a person (indiscernible) good moral character because his application for voluntary departure has been submitted in April of 2004. Accordingly the following order will be entered.

ORDER

IT IS ORDERED that the respondent's application for cancellation of removal pursuant to Section 240A(b) of the Act be denied.

IT IS FURTHER ORDERED that the respondent's request for voluntary departure be denied as a matter of law.

IT IS FURTHER ORDERED that the respondent be removed and deported from the United States to Jordan on the charge contained in the Notice to Appear. Date: April 22, 2004.

CARLOS CUEVAS
U.S. Immigration Judge